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No._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1980

RICHARD GODEK
Petitioner

v.

STATE OF CONNECTICUT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

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QUESTION PRESENTED

1. Whether Petitioner knowingly, voluntarily and intelligently entered a plea of *nolo contendere* and waived his rights to compulsory self-incrimination and confrontation when state trial judge failed to inform Petitioner that by entering the plea he was waiving his right to a court trial and when there was an inadequate factual basis for the plea.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court for the State of Connecticut entered in this proceeding on November 25, 1980, rehearing denied December 11, 1980.

OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at XLII Conn. L.J. No. 22 at 4 (November 25, 1980) and appears in Petitioner's Appendix along with the Court's order dated December 11, 1980, denying a rehearing. Also reprinted in the Appendix is the trial court's memorandum denying Petitioner's motion for change of venue which is relevant to the issues raised herein.

JURISDICTION

The decision of the Connecticut Supreme Court was rendered on November 25, 1980, and an order denying a rehearing was issued on December 11, 1980. This petition for certiorari was filed within sixty (60) days of the judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been comm[illegible]ed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner was originally charged in a two count information by the State's Attorney for Tolland County, State of Connecticut, with the crimes of unlawful restraint in the first degree (Conn. Gen. Stat. §53a-95) and assault in the third degree. [Conn. Gen. Stat. §53a-61(a)(2)] (Record). On July 8, 1978, the State's Attorney filed a substitute information charging the same crimes. (Record) The only difference between the two informations is that the third degree assault charge in the substitute information alleged that the defendant intentionally caused physical injury to another while the original information alleged that the defendant recklessly caused serious physical injury to another. This difference in the information is of no significance since that count was nolled by the State's Attorney on December 12, 1978. (Record). On that same date the defendant entered a plea of *nolo contendere* to the unlawful restraint charge. A complete transcript of that plea was taken.

The transcript of that proceeding reflects that the Petitioner was permitted to plead *nolo contendere* to the unlawful restraint charge without objection from the State. Thereafter, the Court turned to the State's Attorney for a recitation of the factual basis for the plea:

> "THE COURT: All right. The plea of *nolo contendere* is accepted. Mr. Caldwell?
>
> MR. CALDWELL: If your Honor pleases: On October 29, 1977, the victim, in this case a female, was at the home of the defendant, Mr. Godek, in Somers, Connecticut, and at some time on October 30, 1977, she attempted to leave that home. The State alleges she was physically restrained by the defendant from leaving by use of force and the use of handcuffs, exposing the victim to substantial risk of

physical injury, resulting in charges of illegal restraint in the first degree. This occurred in Somers, Connecticut."

The foregoing was the only "factual" recitation of the basis for the plea during the proceedings. Thereafter the Court asked the Petitioner if he discussed the change of plea with his counsel and was satisfied with his advice, to which the Petitioner responded in the affirmative. The Court then read the unlawful restraint statute to the Petitioner and asked whether the Petitioner understood the offense carries a maximum penalty of five years to which the Petitioner answered in the affirmative.

The Court then told the Petitioner the following: "I assume you also understand that you will not be at liberty to withdraw the plea at the time of the sentencing."

The petitioner was also advised that if he had elected to have a jury trial he would have been entitled to a full hearing on the merits involving both counts, the right to counsel during trial, the right to confront and cross-examine witnesses and the right to remain silent. In addition the Petitioner was advised that had he persisted in his election for a jury trial his guilt would have to be established beyond a reasonable doubt.

The Court then asked whether the Petitioner was pleading voluntarily, whether there had been any duress, promises or threats that induced the plea and whether the Petitioner then wished to withdraw his plea. Appropriate responses were received to these inquiries. The Court then asked the Petitioner if he understood that by pleading *nolo contendere* the Court would make a finding of guilty. The Petitioner responded that he wasn't informed of that and thereafter an off the record discussion was held between the Petitioner and his counsel. The question was again put to the Petitioner and he answered in the affirmative. The Court then made the following finding:

"THE COURT: I see! All right. The Court finds that a plea of *nolo contendere* to the charge of unlawful restraint in the first degree has been made voluntarily, with understanding, intelligently and with full knowledge of the consequences. The plea is accepted. The Court will make a finding of guilty on the charge of unlawful restraint in the first degree. A nolle may be noted on the second count of the information. The matter will be continued for pre-sentence."

At no time during the plea proceedings was the Petitioner advised that he had a right to be tried by a judge, nor did he waive this right.

A sentencing hearing was held on February 14, 1979, and thereafter adjourned to March 7, 1979, when the Court imposed a sentence of not less than one (1) nor more than three (3) years at the Connecticut Correctional Institution, Somers. Petitioner then took a direct appeal to the Connecticut Supreme Court which affirmed his conviction. The Connecticut Court held that the failure to advise Petitioner of his right to a court trial was "harmless," and that no factual basis is required for a *nolo contendere* plea.

The issue of the constitutional adequacy of Petitioner's plea was raised for the first time on the direct appeal to the Connecticut Supreme Court.

Prior to entering the *nolo contendere* plea the Petitioner filed a motion for change of venue. (Appendix). The motion alleged that Petitioner could not receive a fair trial in Tolland County. The Motion was denied, and the memorandum denying the motion is reprinted in our Appendix. The motion and memorandum are central to this petition since it is Petitioner's claim that he would

not have waived his privilege against self-incrimination or his right of confrontation if he had been informed at the time he had entered the plea that he could elect to be tried by a court as well as a jury.

REASONS FOR GRANTING THE WRIT

The decision rendered by the Connecticut Supreme Court concerning the constitutionality of Petitioner's plea of *nolo contendere* is probably not in accord with applicable decision of this Court, to wit: *McCarthy v. United States*, 394 U.S. 459 (1969); *Boykin v. Alabama*, 395 U.S. 238 (1969).

I.

PETITIONER DID NOT VOLUNTARILY AND INTELLIGENTLY WAIVE HIS RIGHTS AGAINST SELF-INCRIMINATION AND TO CONFRONT HIS ACCUSERS WHEN THE STATE TRIAL COURT FAILED TO ADVISE PETITIONER OF HIS RIGHT TO A COURT TRIAL DURING PLEA PROCEEDINGS AND WHEN THE RECORD OF THE PLEA PROCEEDINGS FAILED TO STATE A FACTUAL BASIS FOR THE PLEA.

Connecticut law grants to an accused the right to be tried by a court. This right is provided for in Conn. Gen. Stat. §54-82. The importance of this right resulted in the enactment of a rule of practice in Connecticut that requires a trial judge to advise a defendant that by entering his plea he is waiving his right to be tried by a judge. The rule is similar to Rule 11 of the *Federal Rules of Criminal Procedure* and provides as follows:

"The judicial authority shall not accept the plea without first addressing the defendant personally and determining that he fully understands:

(1) The nature of the charge to which the plea is offered;

(2) The mandatory minimum sentence, if any;

(3) The fact that the statute for the particular offense does not permit the sentence to be suspended;

(4) The maximum possible sentence on the charge, including, if there are several charges, the maximum sentence possible from consecutive sentences and including, when applicable, the fact that a different or additional punishment may be authorized by reason of a previous conviction; and

(5) The fact that he has the right to plead not guilty or to persist in that plea if it has already been made, and the fact that he has the right to be tried by a jury **or a judge** and that at that trial he has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself." (Emphasis supplied.)

Conn. Practice Book, §2122

In *Brady v. United States,* 397 U.S. 742 (1970), the Court formulated the standard for determining whether a plea is entered intelligently and voluntarily.

"[A] plea of guilty entered by one fully aware of the direct consequences,...must stand unless induced by threats...misrepresentation... or perhaps by promises that are by their nature improper...." *Id.* at 755.

The decision in *Brady* was one in a long line of cases that recognized the importance of advising a defendant of the direct consequences of his plea. Thus in *Machibroda v. United States,* 368 U.S. 487 (1962) the Court said this:

> "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." (citing *Kercheval v. United States,* 274 U.S. 220, 223)

The Connecticut Supreme Court acknowledged that Petitioner was not advised of his right to a court trial during the plea proceeding. However, the Court held there had been "substantial compliance" with the state rule of practice, and since no federal constitutional rights were involved the Court would not vacate the plea. By way of this request for a writ of certiorari, Petitioner argues that th failure of the state trial judge to advise him of his right to a court trial caused him to unintentionally waive two important constitutional rights: his right against self-incrimination and his right to confront his accusers.

The Court has held that a defendant waives certain fundamental constitutional rights by entering a plea of guilty or *nolo contendere* in a state criminal proceeding. Among those rights are the right against compulsory self-incrimination and the right to confront one's accusers. *Boykin v. Alabama,* 395 U.S. 238, 241 (1969).

In connection with the waiver of these constitutional rights the Court in *McCarthy v. United States,* 394 U.S. 459, 466 (1969) said that for the waiver to be valid

under the Due Process Clause there must be "an intentional relinquishment or abandonment of a known right or privilege." (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Consequently, held the Court, "if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."

Had the Petitioner in the instant case known that he could have been tried by a judge, and not a jury, he would not have waived his rights against self-incrimination and to confront his accusers. This is so because of the circumstances surrounding the plea. Petitioner, a psychologist, was charged in a rural Connecticut county. The State will concede that his arrest generated substantial adverse publicity in the area. That publicity so concerned Petitioner that he filed a motion for change of venue. That motion was made part of the record to the Connecticut Supreme Court and is reprinted in our Appendix. The motion requested the venue change because "the defendant has received extensive pretrial publicity in the press of the Tolland County area which would directly affect his ability to receive a fair trial." (Appendix). The nature of the prejudicial publicity was summarized in a memorandum of decision denying the motion. The memorandum was also contained in the record to the Connecticut Supreme Court and is also reprinted in our Appendix. In all, the memorandum refers to twenty newspaper articles published in the Tolland County area from December 3, 1977, to October 15, 1978, concerning the Petitioner. The *nolo* plea was entered on December 12, 1978.

It is obvious from the motion for change of venue and the memorandum, that Petitioner believed he could not get a fair jury to decide his case in Tolland County. Had he known that a judge and not a jury could have decided his case he would not have waived his right

against self-incrimination and to confront his accusers. As the Court said in *McCarthy, supra*, there cannot be a voluntary and knowing waiver of these rights if Petitioner does not intentionally relinquish or abandon his rights. There would not have been such a waiver in the instant case if the Petitioner had known that he had an alternative to what he believed to be a prejudicial jury - a court trial.

The voluntary and knowing aspect of the plea is further put into question by the fact that there was an inadequate factual basis for the plea. The Connecticut Supreme Court never reached this issue. Instead, the Connecticut Court ruled that no factual basis was required for a *nolo contendere* plea, citing a footnote in *North Carolina v. Alford*, 400 U.S. 25 (1970).

The only statement concerning a "factual basis" was the following comment during the plea proceedings from the State's Attorney:

> "MR. CALDWELL: If your Honor pleases: On October 29, 1977, the victim, in this case a female, was at the home of the defendant, Mr. Godek, in Somers, Connecticut, and at some time on October 30, 1977, she attempted to leave that home. The State alleges she was physically restrained by the defendant from leaving by use of force and the use of handcuffs, exposing the victim to substantial risk of physical injury, resulting in charges of illegal restraint in the first degree. This occurred in Somers, Connecticut.

The elements of unlawful restraint in the first degree require the State to prove: (1) that the defendant "restrained" another person; and (2) the restraint occurred under circumstances which exposed the person to a substantial risk of physical injury. The term "restrain" is defined in Section 53a-91(1):

" 'Restrain' means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has moved, without consent. As used herein 'without consent' means, but is not limited to:

(a) deception and

(b) any means whatever, including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and the parent, guardian or other person or institution having lawful control or custody of him has not acquiesced in the movement or confinement."

The statement by the State's Attorney fails to establish a factual basis for several reasons. First, the State's Attorney's comment only provides what the State "alleges" not what it would prove and through what witnesses if the case had proceeded to trial. Secondly, the State's Attorney failed to set forth facts to establish how the restraint of the victim exposed her to a substantial risk of physical injury. There are numerous circumstances whereby a person can restrain another but not expose that person to substantial risk of physical injury. There are also circumstances where a person can be restrained and exposed to a risk of physical injury, but not to a substantial risk of injury. Thirdly, there are no facts to establish that the Petitioner acted intentionally. Had, for example, the State's Attorney quoted comments by the Petitioner to the "victim" this may have established the intentional aspect of the restraint. Lastly, there are no facts to establish that the victim was "confined." To be detained in a home, or to be restricted is not the same as confinement. All that the statement by the State's Attorney

reveals is that the victim attempted to leave Petitioner's home on October 30, 1977, and was "physically restrained" from leaving by use of "force and the use of handcuffs." How the handcuffs were used or what force exerted by the Petitioner is not disclosed.

Although a "factual basis" for a *nolo contendere* plea may not be constitutionally required, it is a factor that should be considered on the issue of whether Petitioner knowingly, intelligently and voluntarily waived his rights against self-incrimination and confrontation.

Petitioner submits that even though the State had a weak case and failed to put on the record at the time of the plea an adequate factual basis for the plea, he entered the plea because of his concern that he could not receive a fair jury trial in Tolland County due to pretrial publicity. Whether Petitioner's concerns were justified are irrelevant to this petition. The point is that had he known he had a right to a court trial he would not have waived his self-incrimination and confrontation rights.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that the writ of certiorari be granted.

Respectfully submitted,
THE PETITIONER

By HUBERT J. SANTOS
A Member of the Bar
of the Supreme Court
of the United States

No._____

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OCTOBER TERM, 1980

RICHARD GODEK
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STATE OF CONNECTICUT
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APPENDIX

APPENDIX (1)

Opinion of Connecticut State Supreme Court,
XLII Conn. L.J. No. 22 at 4
(November 25, 1980)

SUPREME COURT

October Term, 1980

STATE OF CONNECTICUT *v.* RICHARD GODEK

Cotter, C.J., Bogdanski, Peters, Healey and Parksey, Js.

Argued October 8 - decision released November 25, 1980

Information charging the defendant with the crime of unlawful restraint in the first degree, brought to the Superior Court in the judicial district of Tolland, where the defendant entered a plea of nolo contendere before *Hammer, J.;* judgment of guilty, from which the defendant appealed to this court. *No error.*

Hubert J. Santos, for the appellant (defendant).

Brian S. Mead, special assistant state's attorney, with whom was *Donald B. Caldwell,* state's attorney, for the appellee (state).

ARTHUR H. HEALEY, J. The trial court found the defendant guilty of the crime of unlawful restraint in the first degree, in violation of General Statutes § 53a-95,[1] after accepting his plea of nolo contendere to that charge. On this appeal the defendant urges this court to vacate the plea of nolo contendere and to remand the matter for further proceedings. Essentially, he contends that the trial court erred

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[1]General Statutes §53a-95 provides: "UNLAWFUL RESTRAINT IN THE FIRST DEGREE: CLASS D FELONY. (a) A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose the latter to a substantial risk of physical injury. (b) Unlawful restraint in the first degree is a Class D felony."

in accepting his nolo plea because it was not voluntarily and/or intelligently entered in that (1) the court failed to advise him of his right to be tried by a judge at the time he withdrew his prior election of a trial by jury and (2) there was an inadequate factual basis for his plea.

The defendant was initially charged in a two count information filed on January 26, 1978. The first count charged the crime of unlawful restraint in the first degree in violation of General Statutes § 53a-97, and the second count charged the crime of assault in the third degree in violation of General Statutes § 53a-61 (a) (2). On April 18, 1978, while represented by counsel, the defendant pleaded not guilty to each count and elected a trial by jury on each count.[2] On July 8, 1978, the state filed a substitute information charging the same crimes.[3] On December 12, 1978, the defendant filed a written

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[2]At that time the proceedings included the following colloquy:

"...The clerk: To the first count of the information charging you with unlawful restraint in the first degree, what is your plea? Guilty or not guilty?

The defendant: Not guilty.

The clerk: Do you wish to be tried by the court or jury?

The defendant: By a jury.

The clerk: To the second count of the information charging you with assault third degree, what is your plea? Guilty or not guilty?

The defendant: Not guilty.

The clerk: Do you wish to be tried by the court or jury?

The defendant: Jury...."

[3]The only difference between the original information and the substitute information is that as to the count charging the crime of assault in the third degree the original information charged that the defendant "recklessly" caused serious physical injury to another while the substitute information charged that he did "with intent" cause serious physical injury to another. This difference is of no significance on this appeal because the assault count was nolled by the state pursuant to an understanding between the state and defense counsel on December 12, 1978, when the court accepted the nolo plea to the first count.

plea of nolo contendere to the unlawful restraint charge, which the court accepted after carefully and exhaustively questioning the defendant.

The defendant raised neither of his claims in the court below. Ordinarily, claims not raised in the trial court will not be considered by this court. *State* v. *Zeko,* 176 Conn. 421, 426, 407 A.2d 1022 (1979); see *State* v. *Evans,* 165 Conn. 61, 65, 327 A.2d 576 (1973). Because, however, both of his claims, which essentially allege that the defendant's plea of nolo contendere was not voluntary and intelligent, raise issues of constitutional dimension, we find that they come within one of the exceptions in *State* v. *Evans.* We refer to that situation delineated in *Evans* which allows review where the record, as here, is sufficiently complete for us to consider the claims on the merits and the claims involve a fundamental constitutional right. See *State* v. *Evans,* supra, 70; see also *State* v. *Vasquez,* Conn. (42 Conn. L.J., No. 8, pp. 36, 37) (1980); *State* v. *Arroyo,* Conn. (41 Conn. L.J., No. 39, p. 6) (1980); *State* v. *Chesney,* 166 Conn. 630, 639, 353 A.2d 783, cert. denied, 419 U.S. 1004, 95 S. Ct. 324, 42 L. Ed. 2d 280 (1974).

We take up first the defendant's claim that the plea must be vacated because the court failed to advise him of his right to a trial by a judge, as required by Practice Book, 1963, § 2122 (now Practice Book, 1978, § 711),[4] at the time he withdrew his earlier election for a jury trial. He argues that because of this failure the plea was not voluntarily and/or intelligently made and thus, his due process rights were violated.

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[4]Since the defendant was arrested on December 1, 1977, the 1963 Practice Book rules control. See Practice Book, 1978, §1022 and Practice Book, 1963, §2433. The substance of all of the sections relevant to this opinion, however, has not changed.

"In order for a plea of guilty to be constitutionally valid, the record must affirmatively disclose that the defendant entered the plea voluntarily and intelligently. *Boykin* v. *Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274; *Blue* v. *Robinson*, 173 Conn. 360, 373, 377 A.2d 1108; *Consiglio* v. *Warden*, 160 Conn. 151, 162, 276 A.2d 773." *State* v. *Marra*, 174 Conn. 338, 340, 387 A.2d 550 (1978); see *State* v. *Collins*, 176 Conn. 7, 9, 404 A.2d 871 (1978). "'[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.'" *State* v. *Battle*, 170 Conn. 469, 473, 365 A.2d 1100 (1976); see *State* v. *Marra*, supra. To ensure that a defendant's guilty or nolo contendere plea has been so made, § 2122 (now § 711) of our Practice Book requires that: "The judicial authority shall not accept the plea without first addressing the defendant personally and determining that he fully understands: (1) The nature of the charge to which the plea is offered; (2) The mandatory minimum sentence, if any; (3) The fact that the statute for the particular offense does not permit the sentence to be suspended; (4) The maximum possible sentence on the charge, including, if there are several charges, the maximum sentence possible from consecutive sentences and including, when applicable, the fact that a different or additional punishment may be authorized by reason of a previous conviction; and (5) The fact that he has the right to plead not guilty or to persist in that plea if it has already been made, and the fact that he has the right to be tried by a jury or a judge and that at that trial he has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself."

The nolo proceedings in the present case indicate that although the court complied with every other facet of the rule, it failed specifically to question

the defendant with regard to one aspect of subsection (5): the right to trial by a judge. Urging us to adopt a per se rule for any violation of § 2122, the defendant contends that this failure requires the plea to be vacated.

In urging that we follow a per se rule for a violation of § 2122 of our rules, the defendant refers us to the adoption of such a rule by the United States Court of Appeals for the Second Circuit for a violation of the federal counterpart of § 2122: rule 11 of the Federal Rules of Criminal Procedure.[5] In *United States* v. *Journet*, 544 F.2d 633 (2d Cir. 1976), that court was presented with the question whether a guilty plea must be invalidated where the district court judge advised the defendant of most of the constitutional rights referred to in rule 11 (c) but failed explicitly to inform him of certain other constitutional rights and matters provided in that

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[5]Rule 11(c) provides: "Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following: (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and (5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement." Fed. R. Crim. Proc., rule 11.

rule. *United States* v. *Journet*, supra, 636. The *Journet* court held that "unless the defendant is specifically informed of each and every element enumerated in Rule 11 the plea must be vacated." *United States* v. *Journet*, supra, 634. In *Journet*, the trial judge did not advise the defendant that the maximum possible penalty included possible lifetime parole, that at a trial Journet would enjoy the privilege against self-incrimination, that he had a right to counsel at trial, that if his guilty plea were accepted no further trial of any kind would be held, and that if he decided to plead guilty, the court would have the right to ask him questions under oath in which event, if he gave untrue answers, his statements could be used against him in a prosecution for perjury. *United States* v. *Journet*, supra, 636–37; see *United States* v. *Saft*, 558 F.2d 1073, 1080–81 (2d Cir. 1977).

We have had occasion to note that where a Practice Book rule "is practically identical" with a like federal rule of civil procedure, cases construing and applying the latter "are of persuasive, even though not controlling, authority." See *Masterson* v. *Atherton*, 149 Conn. 302, 316, 179 A.2d 592 (1962). A comparison of rule 11 and Practice Book, 1963, § 2122 discloses that, while they are similar, they are not "practically identical" either in language or provision. No claim is made, nor could it be, that we are required to follow the cases construing rule 11, a rule binding only in the federal courts. Although we do not approve of any failure to comply with the explicitly stated requirements of § 2122, or General Statutes § 54-82,[6] which allows a criminal defendant to elect a trial by court instead of by jury, it does not follow that every deviation from the specific requirements of either the statute or the

[6]General Statutes §54-82 provides in part: "In any criminal case, prosecution or proceeding, the party accused may, if he so elects when called upon to plead, be tried by the court instead of by the jury...."

rule or both mandates a conclusion of reversible error. See *People* v. *Ellis*, 59 Ill. 2d 255, 320 N.E.2d 15 (1974); *Trotter* v. *State*, 218 Kan. 266, 543 P.2d 1023 (1975). We are very much aware that the constitutional rights of a criminal defendant in taking either a guilty or a nolo plea must be scrupulously protected. See, e.g., *Boykin* v. *Alabama*,[7] supra; *McCarthy* v. *United States*, 394 U.S. 459, 466–67, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); *State* v. *Collins*, supra; *State* v. *Marra*, supra. We are of the opinion, however, that those constitutional rights can just as carefully be guarded without adopting a per se rule for § 2122 (now § 711) of our Practice Book. Accordingly, we hold that where there has been a substantial compliance with § 2122, such that none of the defendant's constitutionally protected rights has been infringed upon, the failure to comply with each and every requirement of § 2122 does not automatically require the vacating of the defendant's plea.[8]

The defendant next contends that even if this court should not adopt a per se rule, his constitutional rights have still been infringed upon because he was not advised of his right to a court trial. Stated in terms of the above formulation, he alleges that, even following a substantial compliance rule,

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[7]*Boykin* observed that "[s]everal federal constitutional rights are involved in a waiver...when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reasons of the Fourteenth Amendment.... Second, is the right to trial by jury.... Third, is the right to confront one's accusers." *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

[8]Practice Book, 1963 §2132 (now §721), in fact, uses a "substantial compliance" standard as a basis for allowing the defendant to withdraw his guilty plea. That section allows the defendant to withdraw his plea if "[t]he plea was accepted without substantial compliance with §2122 [now §711]."

there has not been substantial compliance with § 2122 to ensure that his plea was made voluntarily and intelligently.

With regard to this claim, we first note that at the time the defendant elected to plead nolo, he was clearly advised of all of those rights enumerated in § 2122, with the exception of his right to a court trial.

Secondly, there is no question that the defendant had been informed at the time of his pleas of not guilty to the original information–which charged the same two crimes as the substitute information, and to one count of which he pleaded nolo contendere–of his right to a trial by court or jury. At that time he elected a trial by jury on both counts. On December 12, 1978, the defendant himself withdrew that prior election. He did so for the purpose of entering a written nolo contendere plea which he and his attorney had signed. It is clear from the transcript of the proceedings that the state and the defense had discussed the matter of entering a nolo plea earlier. Defense counsel concurred in the court's observation that there would be no recommenadtion by the state "with respect to this matter" and said that the "only representation made to the defendant" was that "there would be other action taken [with respect to] the second count (the assault count)." The defendant stated that he had discussed his change of plea with his attorney and that he was satisfied with his attorney's advice. He makes no claim of ineffective assistance of counsel, and he said at least *twice* that by entering a nolo plea he understood that the court had "no alternative but to enter a finding of guilty" on that plea.

Finally, we note that although General Statutes § 54-82 provides that a criminal defendant, when called upon to plead, may elect to be tried by the court instead of by jury, this election is not a right

guaranteed by our federal constitution.[9] *Singer* v. *United States,* 380 U.S. 24, 34, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965); see *United States* v. *Joyce,* 499 F.2d 9, 21 (7th Cir. 1974), cert. denied, 419 U.S. 1031, 95 S. Ct. 512, 42 L. Ed. 2d 306 (1974); *Thwing* v. *South Dakota,* 470 F.2d 351, 353 (8th Cir. 1972), cert. denied, 411 U.S. 937, 93 S. Ct. 1917, 36 L. Ed. 2d 399 (1973). While the Connecticut constitution provides in article 1, § 8 that ". . . the accused shall have a right . . . in all prosecutions by indictment or information to a speedy, public trial by an impartial jury. . . ." it does not guarantee a criminal defendant a right to a nonjury trial.

Thus, we conclude that there has been substantial compliance with § 2122 such that the defendant's constitutional rights were not violated when the court failed to advise the defendant, at the time of accepting his plea, that he had a right to a court trial.

We take up now the defendant's claim that his plea must be vacated because it was not made voluntarily, intelligently and/or knowingly because it lacked a factual basis. In considering this issue, we examine whether a factual basis must be established for a valid plea of nolo contendere.[10]

Under both federal and Connecticut rules of criminal procedure, a factual basis must be established before a court can accept a guilty plea. See Fed. R. Crim. Proc., rule 11(f); Practice Book, 1978,

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[9]While a federal criminal defendant has no right to a nonjury trial, rule 23(a) of the Federal Rules of Criminal Procedure provides: "Trial by jury. Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

[10]For extensive discussions of the plea of nolo contendere see annot., 89 A.L.R.2d 540 and Later Case Service p. 185; annot., 152 A.L.R. 253; Lenvin and Meyers, "Nolo Contendere: Its Nature and Implications." 51 Yale L.J. 1255.

§ 713. Under federal criminal procedure, the trial court need not establish a factual basis for a nolo plea. See Fed. R. Crim. Proc., rule 11; *North Carolina* v. *Alford,* 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *United States* v. *Prince,* 533 F.2d 205 (5th Cir. 1976); *United States* v. *Wolfson,* 52 F.R.D. 170 (D. Del. 1971), aff'd, 474 F.2d 1340 (3d Cir. 1973); see also 1 Wright, Federal Practice & Procedure § 177, pp. 384, 390–91 (1969). Under our rules of practice, it is unclear whether a factual basis is required to accept a nolo plea.

Taken in isolation, § 2124 (now § 713) does not require a factual basis for the acceptance of a nolo contendere plea. That section reads in full: "The judicial authority shall not accept *a plea of guilty* unless he is satisfied that there is a factual basis for the plea." (Emphasis added.) When, however, that section is read in conjunction with other sections of that chapter, it appears that a factual basis may be required for nolo contendere plea.[11]

In *North Carolina* v. *Alford,* supra, Justice White succinctly pointed out the distinction between a guilty plea and a nolo contendere plea, and why a factual basis may not be desirable for the acceptance of the latter. In his majority opinion, he explained that: "Throughout its history . . . the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were

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[11] In providing that a defendant may "withdraw his plea of guilty or nolo contendere," Practice Book, 1963, §2131 (now §720) recites that his plea may be withdrawn "upon proof of one of the grounds in §2132 [now §721]." One of the grounds listed in §2132 is that "[t]here was no factual basis for the plea...." Practice Book, 1963, §2132(5). Section 2128 (now §717) requires that "[a] verbatim record shall be made of the proceedings at which the defendant enters a plea of guilty or nolo contendere." Section 2128 continues: "This record shall include...the inquiry into the factual basis for the plea."

guilty and a prayer for leniency. Fed. Rule Crim. Proc. 11 preserves this distinction in its requirement that a court cannot accept a guilty plea 'unless it is satisfied that there is a factual basis for the plea'; there is no similar requirement for pleas of *nolo contendere,* since it was thought desirable to permit defendants to plea *nolo* without making any inquiry into their actual guilt . . . ." *North Carolina* v. *Alford,* supra, 35–36 n.8.[12]

We agree with the distinction made by Justice White in *Alford* and by the federal rules, and hold that although our own rules may be unclear, a factual basis is not required to be established to accept a nolo contendere plea. Thus, we need not reach the question whether a factual basis has been established.[13]

There is no error.

In this opinion the other judges concurred.

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[12]The Notes of the Advisory Committee on the 1966 amendment to the Federal Rules of Criminal Procedure state that: "For a variety of reasons it is desirable in some cases to permit entry of judgment upon a plea of nolo contendere without inquiry into the factual basis for the plea. [The factual basis requirement]...is not, therefore, made applicable to pleas of nolo contendere." 18 U.S.C.A. Fed. R. Crim. Proc., rule 11, Notes of the Advisory Committee on the Rules, 1966 amendment.

[13]Although we conclude that our rules do not require that a factual basis be established for a plea of nolo contendere, we emphasize that this in no way lessens the importance of requiring that the record affirmatively disclose that the nolo plea was entered voluntarily, knowingly and intelligently. By pleading guilty or nolo contendere to criminal charges, a defendant waives several federal constitutional rights and consents to the judgment of the court. *Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *McCarthy v. United States,* 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969); *State v. Battle,* 170 Conn. 469, 473, 365 A.2d 1100 (1976). While a defendant who is permitted to plead nolo contendere does not expressly admit his guilt in doing so; see *North Carolina v. Alford,* 400 U.S. 25,

13 (continued)

35, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *Tempo Trucking & Transfer Corporation v. Dickson*, 405 F. Sup. 506, 516 (E.D.N.Y. 1975); the defendant effectively consents to being punished as if he were guilty. *North Carolina v. Alford*, supra, 35-36 n. 8. Accordingly, because "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences"; *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); it is required that the record affirmatively disclose that a plea of nolo contendere was voluntarily, intelligently and knowingly made. See *Boykin v. Alabama*, supra, 242; *Brady v. United States*, supra, 747; *In re McMorrow*, 133 Vt. 472, 475, 346 A.2d 218 (1975) (plea of nolo contendere).

Secondly, although our rules do not require that a factual basis be established before accepting a nolo contendere plea, this does not prohibit the trial court judge, in his discretion, from insisting upon the establishment of a factual basis before accepting a nolo plea. In this regard, we agree with the position taken by the First Circuit in *United States v. Cepeda Penes*, 577 F.2d 754 (1st Cir. 1978), where that court found no error in the trial court's insistence upon the establishment of a factual basis before it accepted a plea of nolo. That court stated: "While it may be desirable, in some cases, for a judge to permit a defendant to plead *nolo* without requiring a factual basis, see *North Carolina v. Alford*, 400 U.S. 25, 35-36 n.8, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), Rule 11 does not *prohibit* a judge from exercising his discretion in determining *whether* to accept such a plea and imposing conditions on its acceptance, subject to review only for abuse of discretion." (Citations omitted.) *United States v. Cepeda Penes*, supra, 756.

APPENDIX (2)

Order of Connecticut State Supreme Court Denying Motion For Rehearing Dated December 11, 1980

NO. 9518 : Supreme Court

State of Connecticut : State of Connecticut

vs. : December 11, 1980

Richard Godek

ORDER

The defendant's Motion To Reargue having been presented to the Court it is hereby

ORDERED DENIED.

By the Court,

Donald H. Dowling
CHIEF CLERK

Notice
Donald Caldwell, State's Attorney
Buckley & Santos
Superior Court, Tolland
December 11, 1980

APPENDIX (3)

Motion for Change of Venue

NO. 4237

State of Connecticut	)	Superior Court
	)	
v.	)	J.D. of Tolland
	)	
Richard Godek	)	

MOTION FOR CHANGE OF VENUE

The defendant in the above case moves that this matter be transferred from the Judicial District of Tolland to the Judicial District of Hartford-New Britain at Hartford or some other judicial district on the grounds that the defendant has received extensive pretrial publicity in the press of the Tolland County area which would directly affect his ability to receive a fair trial.

DEFENDANT

By Igor I. Sikorsky, Jr.

ORDER Dec. 6, 1978

The above motion is denied. See Memorandum of Decision.

BY THE COURT
(Hammer, J.)

APPENDIX (4)

Memorandum Denying Motion For Change of Venue

NO. 4237

State of Connecticut	)	Superior Court
	)	
v.	)	J.D. of Tolland
	)	
Richard Godek	)	

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION FOR CHANGE OF VENUE

The defendant has moved that this case be transferred to another judicial district on the ground that he has received extensive pretrial publicity in the Tolland County area press "which would directly affect his ability to receive a fair trial" in this court.

The defendant was arrested on December 1, 1978, on charges of unlawful restraint in the first degree and assault in the third degree. At that time he was a person of some prominence in the community by virtue of his position as director of the Hockanum Valley Community Service Center, a social services agency in the Town of Vernon. The complaint which resulted in his arrest was initiated by the alleged victim, a public health nurse employed by the Rockville Public Health Nursing Association.

At the hearing on the motion the defendant introduced twenty newspaper articles in evidence which appeared during the period from December 3, 1977, to October 15, 1978, in two daily newspapers, the Journal Inquirer and the Hartford Courant, and a weekly newspaper, the Tri-Town Reporter, all of which have a wide circulation in Vernon and surrounding towns. Most of the newspaper stories relate only tangentially to the offenses with which the defendant is charged. They deal primarily with the circumstances under which his employment with the community social services agency was terminated and his subsequent difficulties in attempting to establish and operate a private medical laboratory in Vernon. They also include news accounts

of civil actions brought by the defendant and the complainant against each other after his arrest.

The articles that appeared in December, 1977, are factual, restrained reports of problems that arose in connection with his employment (which appear to have been of long standing), rather than inflammatory or dramatic accounts of the details of the alleged offenses. Because of the public nature of his position those problems would have been newsworthy independently of the fact of his arrest at that particular time. The earlier stories report that following his arrest the defendant was granted a leave of absence by the agency that employed him. At the same time his employer "reaffirmed its confidence" in his professional abilities. (Ex. 18, 20). The later accounts emphasize the fact that his eventual dismissal was unrelated to his arrest. In a story published on January 12, 1978, the defendant himself conceded that he lost his job because of his "independence and outspoken nature." (Ex. 13). It also appears that a good deal of the publicity concerning his employment difficulties may have been generated or escalated by the defendant's admitted lack of reticence and his understandable eagerness to present his views to the public through the news media. (See e.g., Exs. 12, 14).

Besides being factual in nature, many of the stories are favorable to the defendant and some even tend to raise serious doubts in the mind of the reader as to his guilt. Exhibit 16 is a prominently displayed story in the Journal Inquirer of December 6, 1977, which deals in its entirety with an alibi defense based on the fact that he was a patient in a local hospital for part of the time during which it was alleged that he committed the crimes charged. Exhibit 15 is an account of a defense motion to dismiss which could reasonably tend to suggest some doubt as to the credibility of the complainant.

Counsel for the defendant concedes, as he must, that the publicity complained of highlights the post-arrest activities of the alleged offender rather than the alleged

offenses. Most of the more recent stories concern the defendant's financial difficulties in connection with his unsuccessful business venture. Some of them do in fact reflect on his character, professional qualifications and veracity. However, even these accounts are factually presented, evenly balanced and non-conclusory. For example, the most recent account (and presumably the one freshest in the mind of a prospective juror) dated October 15, 1978, closes with the following paragraph:

> "After he formed Tolland County Medical Laboratories, Godek became enmeshed in a controversy over allegedly misrepresenting his professional credentials on a loan application and several other issues of financial responsibility, all of which remain in the form of accusations and claims, which Godek denies." (Ex. 1).

When a defendant requests a change of venue, he has the burden of showing that a fair and impartial trial cannot be had where the case is pending. *State v. Rogers,* 143 Conn. 167, 172; Practice Book §2246. With regard to publicity in the news media, he must show more than the mere fact of publicity. He must demonstrate that it was necessarily prejudicial and prevented him from receiving a fair trial. *State v. Hart,* 169 Conn. 428, 432, 433. Relevant factors to be considered are whether the material was inflammatory or biased in nature, the passage of time, and whether a reasonable balance has been maintained between the rights of the news media and the rights of the defendant. *State v. Anonymous,* 30 Conn. Sup. 108, 110.

Reflections on the character of the accused from newspaper accounts which do not contain conclusions or opinions are not ordinarily grounds for a change of venue even where such statements are false. *State v. Harris,* 271 P. 316. In any event, where prejudice is not readily apparent, the only way to determine whether or not a fair and impartial jury can be picked is to start questioning jurors to learn the extent of such prejudice, if any, against the defendant. *United States v. Kline,*

205 F. Supp. 637, 638; *United States v. Denno*, 148 F. Supp. 498, 501.

A distinction must be made between mere familiarity with the defendant and his activities and actual bias and prejudice against him just as a distinction must be made between factual and invidious or inflammatory publicity. *Beck v. Washington*, 369 U.S. 541, 556. To ignore the real differences in the potential for prejudice does not promote fundamental fairness, but only makes impossible the timely prosecution of persons who are well known in the community whether they be notorious or merely prominent. *Murphy v. Florida*, 421 U.S. 794, 801.

For the foregoing reasons the court is of the opinion that a jury can be selected in this judicial district that can be fair and impartial and that the defendant's constitutional right to a fair trial does not require a change of venue.

Accordingly, the motion is denied.

Hammer, J.

Filed December 6, 1978